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Supreme Court of the United States

OCTOBER TERM, 1962

No. 700

HARRY H. HALLATT and MARY VALENTINE HALLATT,

Petitioners,

vs.

MARYLAND CASUALTY COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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STATEMENT OF THE CASE.

INTRODUCTION.

The petition for writ of certiorari brings here for review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, reversing a judgment of the United States District Court for the Southern District of Florida, Miami Division, (A 1-25). The District Court rendered a final judgment in favor of the plaintiffs (petitioners herein), Harry H. Hallatt and Mary Valentine Hallatt, and against the garnishee (respondent) Maryland Casualty Company, for the sum of

Nine Thousand Two Hundred Sixty-seven and 52 100 Dollars ($9,267.52). The case involves the obstinate, wilful and deliberate refusal of one James Richard Richardson, the Maryland assured, to attend the trial of a negligence action brought against him by the petitioners, and whether his conduct amounted to a breach of the cooperation clause of the automobile liability policy which Richardson carried with Maryland Casualty Company.

IDENTITY OF PARTIES AND RECORD REFERENCES.

For convenience we will refer to the plaintiffs in the court below as "the petitioners" and to the garnishee, Maryland Casualty Company, as "the respondent." All references to the transcript of record will be preceded by the designation "R" and references to the appendix to the petitioners' brief will be preceded by the designation "A".

THE FACTS

The petitioner Mary Valentine Hallatt was injured in an automobile accident in the City of West Palm Beach, Florida. She and her husband brought suit against James Richard Richardson, the driver of the opposing vehicle, claiming damages for personal injuries sustained in the accident. The case was removed to the District Court for the Southern District of Florida, on the basis of diversity of citizenship. The case was tried to a jury, resulting in a verdict and judgment in favor of the petitioners and against Richardson, in the sum of Eight Thousand Seven Hundred Ninety-seven Dollars ($8,797.00) (R 1,2).

Richardson carried a policy of automobile liability insurance with the respondent, which contained the usual cooperation clause requiring that "the insured shall cooperate with the company and upon the company's request shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses, and in the conduct of suits." (R 235) Richardson, who resided in Massachusetts, flatly refused to attend the trial of the case in West Palm Beach, Florida, although all arrangements were made for him by the respondent, including prepaid airline ticket, hotel accommodations and travel expenses (R 127, 128). He was promptly notified when the case was first set for trial, and repeatedly notified thereafter of his obligations to attend and give evidence in his own behalf (R 120-140). Every media of communication was employed, including numerous registered letters, telegrams, long distance phone calls, and personal interviews by representatives of respondent at the place of his residence (R 240-251). Richardson's only response was a brief letter in which he said "I shall be unable to make it to Florida as I am working now." (R 131) The attorneys for respondent then disclaimed coverage and moved the court for leave to withdraw from the case. (R 134, 135) The motion was denied and the case proceeded to trial, resulting in a verdict in favor of the plaintiffs. After judgment the petitioners sued out a writ of garnishment against respondent, which was tried to a jury on the issue of non cooperation in the Federal District Court in Miami, Florida, resulting in a verdict and judgment adverse to the respondent (R 80, 81). At the trial of the case respondent contended that under the law of Florida a wilful, unjustified refusal of the insured to attend the trial of the case was a breach of the cooperation clause of the

policy and amounted to prejudice to the insurer as a matter of law. During the course of the garnishment trial in the District Court counsel for petitioner, over the objections of respondent, sought to elicit from the respondent's witnesses the facts to which Richardson would have testified had he been present at the trial. Respondent strenuously objected to this line of inquiry, upon the grounds that it amounted to a retrial of the issues of the main action, and that it would amount to the grossest kind of speculation and conjecture to permit one Federal jury to speculate and conjecture as to what another Federal jury would have done if one item of evidence had been before it, without submitting to the jury the entire record in that case, including the argument and charges of the court (R 157). The objections were overruled by the District Court (R 158). The Court of Appeals for the Fifth Circuit, in a careful and well considered opinion, reversed the District Court and granted a new trial. It held, in effect, that an unjustified failure of the insured to attend the trial is as a matter of law in Florida prejudicial to the insurer (A 14, 15). The case was "tried on an erroneous theory of law as to the necessity of proof by Maryland that it was prejudiced by the absence of Richardson from the trial * * *." (A 15)

THE PROPRIETY OF REVIEW BY CERTIORARI.

This case does not involve a Federal question of substance, a constitutional question, nor does it involve a conflict of decisions between circuits. It simply involves the correctness of the appellate court's interpretation and construction of the Florida law, in the absence of a controlling precedent. Like every problem its solution is important to the litigants. It is a matter of local interest to

a small segment of the Florida Bar engaged in insurance litigation. Construction of the insurance contract in accordance with Florida law has some academic interest, but viewed from the standpoint of the highest court in the land, it is simply a matter of isolated significance. A classic statement of the character of reasons which the court will consider on petition for certiorari may be found in the language of Mr. Justice Frankfurter, in **Rice v. Sioux City Memorial Park Cemetery, U. S. Iowa, 1955, 75 S. Ct. 614, 349 U. S. 70, 99 L. Ed. 897, 901;**

> "* * * In illustrating the character of reasons which may be deemed 'special and important,' the Rule refers to cases.
>
> "'Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.'
>
> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. 'Magnum Import Co. v. Coty, 262 U.S. 159, 163, 67 L. ed. 922, 924, 43 S. Ct. 531; see also Address of Mr. Chief Justice Vinson, before the American Bar Association, Sept. 7, 1949, 69 Sup. Ct. v, vi; Address of Mr. Chief Justice Hughes, before the American Law Institute, May 10, 1934, XI Proc. Am. Law Inst. 313.' 'Special

> and important reasons' imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion. * * * "

We fail to see how the application of Florida law to a contract problem of local dimensions could be considered "special and important reasons" implying a reach to the problem beyond "the academic or episodic."

QUESTION FOR DETERMINATION

IN DETERMINING FLORIDA LAW IN A DIVERSITY CASE, IS THE FEDERAL COURT BOUND TO FOLLOW STATE COURT DICTA WHICH THE STATE COURT ITSELF WOULD NOT BE REQUIRED TO FOLLOW?

ARGUMENT

It is at once apparent from a reading of the opinion, that the Fifth Circuit did not misconceive its duty to apply the Florida law to the contract problem before it. Judge Jones stated at the outset:

> "We have no academic interest as to which pan of the scales carries the greatest bulk of precedent. Our task is to determine which of the conflicting rules is the law of Florida." (A-5, 6)

The Court then proceeded to carefully scrutinize the

Florida cases and determined that the statements of the Florida Court which had been urged upon it were merely ancillary, nonessential, gratuitous statements of the Florida court, which would not have been binding on that court itself. In **King v. Order of United Commercial Travelers, 333 U.S. 153, 68 S. Ct. 488, 92 L. Ed. 608, reh. den. 333 U.S. 878, 68 S. Ct. 900, 92 L. Ed. 1153**, it was held that a Federal court is not bound by a decision which would not be binding upon the courts of the state. Mr. Chief Justice Vinson, speaking for the Court, said:

> "* * * Furthermore, as we have but recently had occasion to remark, a federal court adjudicating a matter of state law in a diversity suit is, 'in effect, only another court of the State;' **it would be incongruous indeed to hold the federal court bound by a decision which would not be binding on any state court.**" (Emphasis ours)

The Florida courts have repeatedly held that the language in a judicial opinion which is merely ancillary and nonessential to the decision is without force as a precedent. See **State v. Florid State Improvement Commission, Fla., 60 So. 2d 747; Twyman v. Roell, 123 Fla. 215, 166 So. 215; State ex rel Helseth v. DuBose, 99 Fla. 812, 128 So. 4; Pell v. State, 97 Fla. 650, 122 So. 110; Myers v. Atlantic Coastline Railroad Company, Fla., 112 So. 2d 263; Anderson v. City of Miami, Fla., 101 So. 2d 612.** In the last case cited the Florida District Court of Appeal said:

> "With all due respect, it is our opinion that we should not seek so elusive a phantom as the spirit of an opinion but should consider ourselves bound

> only by those propositions held to be determinative."

To the same effect see also **State v. Florida Improvement Commission, Supra,** wherein the Supreme Court of Florida held:

> "The language above quoted was not essential to a decision in that case and is obiter dicta. It is not controlling in this case."

It is obvious that the language of the three Florida cases relied on by petitioners was not determinative of the issues before the court, and the same would therefore not be binding on the state court or a federal court, which in a diversity suit is "in effect only another court of the state." **Guaranty Trust Co. v. York, 326 U.S. 99, 108, 89 L. Ed. 2079, 2085, 65 S. Ct. 1469, 160 A.L.R. 1231.**

Petitioners suggest that Florida dicta is at least entitled to "respectful consideration." It is quite apparent from even a cursory reading of the opinion that the Fifth Circuit has not only given the Florida dicta respectful consideration, but has given each case announcing it a careful and searching analysis, and such weight as was legally permissable within the scope of the rule.

Of course, in giving respectful consideration to Florida dicta it was necessary that the court take into account all dicta bearing on the problem. The decision of the District Court of Appeal in **State Farm Mutual Automobile Insurance Co. v. Ranson, Fla. App., 121 So. 2d 175** is a persuasive case which holds that the giving of timely notice to the insurer is a condition precedent to the insurer's

liability, and failure to comply is grounds for voidance of the policy. The court said:

> "(3) The dearth of Florida law on this issue is matched, however, by an abundance of case law and textual treatment thereof from other jurisdictions. A distinction has been made by the courts between policies which expressly make compliance with the clause a condition precedent to the liability of the insurer under the policy, and those which omit such an express statement. It appears to be well settled that where the liability policy makes the insured's failure to give timely notice expressly the ground of forfeiture, or compliance therewith a condition precedent to the insurer's liability no recovery can be had where timely notice has not been given. Annotation 18 A.L.R. 2d 443; 5A Am. Jur. Auto. Ins., sec. 151; 45 C.J.S. Insurance §. 1055."

The policy in the Ranson case contained a provision identical with the case at bar, to the effect that compliance with the policy requirements is a condition precedent to recovery.

The Fifth Circuit was not without precedent because it had previously considered the precise point in two previous cases arising from Florida, interpreting the cooperation clause. We refer to the two Rexford cases, **Royal Indemnity Co. v. Rexford, 5th Cir. 1952, 197 F. 2d 83, and Rexford v. Royal Indemnity Co., 5th Cir. 1954, 215 F. 2d 693.**

In these cases involving the interpretation of Florida law, the Fifth Circuit was acting, in effect, as another court of the State, and here we are presented with a controlling precedent. The first **Rexford** case, reported in 197 F. 2d 83, is directly in point. In this case the plaintiff recovered a $35,000 judgment against the insured, and then sued out a writ of garnishment against Royal Indemnity Company to reach the proceeds of a $10,000 automobile liability policy. The garnishee set up as a defense the violation of the assistance and cooperation clause, alleging, among other things, that the assured failed to attend the trial and otherwise assist in trial preparations. The case was submitted to a jury and resulted in a verdict and judgment in favor of the plaintiff and against the garnishee. The garnishee appealed, contending, among other things, as follows:

> "There was a pretrial conference and order and a trial to a jury. Insisting throughout that, on the evidence, no fact issue was made, and it was entitled to an instruction as a matter of law, it also vigorously resisted the efforts of the plaintiff in garnishment to retry the damage suit on his theory that by doing so he could show that, granting that there was no cooperation on the part of the insured, the failure to cooperate was not material since under the evidence there was no defense to the suit.
>
> "The court, after a rather full discussion of the point, being of the opinion that the evidence bore on the materiality of the non cooperation, admitted the evidence, over objection, and the case was tried, with the inevitable result that,

with a seriously injured man and an insurance company before them, the jury was trying the question of whether the plaintiff was injured and whether he ought to recover from the insurance company, instead of trying the question whether the policy had been avoided before the trial by the failure of the insured to cooperate."

The Court of Appeals reversed the case and sent it back for a new trial, and sustained the garnishee's contention. The Court held:

"When it comes, however, to appellant's second point, that it was reversible error to permit the plaintiff in effect to retry the damage suit to show that the evidence for recovery in it was so strong that cooperation could not have done any good, and, therefore, the failure to cooperate was immaterial, and it is quite plain that the suit was tried on an erroneous theory and in such fashion that a fair verdict on the real issues in the case could not be obtained.

"The only issue for trial in the garnishment suit was whether the policy, which the garnishee had issued to the insured, was no longer of force because, before the trial of the damage suit, it had been avoided by the failure of the insured to cooperate. There is no doubt that, under all the authorities, the non cooperation must have been material. None that, in a case of this kind, there might be an issue of fact for the jury upon whether the lack of cooperation was accidental, incidental, or immaterial. It cannot, however, be

claimed that it was at all material, to the question at issue in the suit, whether there was non co-operation in a material respect, **to prove that the case was so strong that plaintiff would have gotten a verdict, no matter what the insured testified or did, and that therefore,** it was proper to in effect retry the damage suit. No case is cited, we have found none, which supports the theory on which the case was tried."

In the second **Rexford** appeal the rule was not changed or modified.

We respectfully submit that the Rexford decisions constitute a controlling precedent, and that the decision of the Circuit Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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